SUPREME COURT OF THE UNITED STATES.

No. 209.

THE STILLWELL AND BIERCE MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

AMOS PHELPS, DEFENDANT IN ERROR.

STATEMENT.

The plaintiff in error brought this action against the defendant to recover the sum remaining unpaid, on a contract dated May 30th, 1883, whereby the plaintiff agreed to furnish and put in operation for the defendant in his flouring mill at Delavan, in the County of Walworth, in the eastern district of Wisconsin, within ninety days from said date, "one first-class 75 barrel capacity roller mill complete" for the sum of $9,000, $3,000 of which was to be paid when the machinery arrived at the said mill, and $4,000 when said mill was completed and in running order to the satisfaction of the defendant, and $2,000 within ninety days after the completion of said mill as aforesaid, and the first party to start the mill and see that it is in complete running order.

The complaint alleged that the plaintiff had fully performed the contract and admitted that $3,272.47 had been paid on account thereof, and claimed to recover the balance, $5,727.53.

The answer admitted the execution of the contract (a copy of which was attached to the answer), the sending of certain machinery to the mill by the plaintiff; alleged that the defendant had paid to the plaintiff, or to third parties at plaintiff's request, in the aggregate $3,784.06, to apply on the contract. It denied that the plaintiff had performed the contract. On the contrary alleged that the plaintiff, in a dilatory manner, continued its attempts to put the mill in operation up to February 1st, 1884, when the plaintiff claimed that the mill was complete. It alleged that the mill would

not produce marketable flour although it was tested by the defendant thoroughly with the best wheat and the best expert millers that he could obtain. That upon learning of such defects the defendant notified the plaintiff and demanded that the plaintiff complete said mill and remedy said defects, which the plaintiff failed and refused to do, and thereupon the defendant proceeded to put the mill in repair, expending a very large sum for that purpose, to-wit: $2,171.89, and that the mill was not completed until about July 1st, 1884, and that the defendant's mill was of the value of $30,000, and that by reason of the delay and loss of business he suffered damage in the sum of about $7,000, and that a large amount of wheat was destroyed in attempting to make flour with the mill, all of which the defendant sought to recover from the plaintiff by way of counter-claim.

The issue was tried before a jury. The plaintiff introduced evidence tending to prove the allegations of the complaint, and the defendant offered testimony sustaining the allegations of the answer. The jury returned a verdict for the defendant.

On the trial several exceptions were taken to rulings of the Court in the admission and rejection of evidence, and the plaintiff's counsel excepted to portions of the charge of the Court to the jury. On the motion for a new trial the plaintiff argued some of these exceptions.

This is the only means counsel for the defendant has of knowing what errors are relied upon in this court as there is no assignment of errors attached to the record, and counsel has not, at this writing, been able to obtain a copy of the argument for plaintiff in error.

Upon this record the counsel for defendant now moves to dismiss the case because there is not attached to the record an assignment of errors as required by Section 997 of the Revised Statutes, Rule 8, Section 1; Rule 21, Sections 4 and 5, of this Court.

Benites *vs.* Hampton, 123 U. S., 519.

If the above motion is denied, then I submit that the rulings of the Circuit Court on the trial were correct.

I.

The plaintiff introduced evidence tending to show the rental value of the defendant's mill during the delay of the plaintiff to complete the same. Among other witnesses he called Charles Geisner, who testified that he owned and managed a roller mill in the County of Waukesha, and near Waukesha village, of about 75 or 100 barrels capacity, and was personally acquainted with the milling business and familiar with roller mills. That the County of Waukesha adjoins the County of Walworth, in which the mill in question is

located, but that he had never seen the defendant's mill, he had never been in Delavan, and knew nothing from personal observation of the custom work of the mill, its business or product, nor of the water power. He was then asked to state the rental value of the mill during the period in question. The evidence was objected to because the witness had never seen and had no personal knowledge of the property in question, and was, therefore, incompetent to testify as to the rental value.

The Court sustained the objection and the plaintiff excepted to the ruling.

The witness was then asked to state such rental value upon the supposition that said mill had a good water power and all the business it could attend to, as claimed by the defendant, and a capacity of manufacturing seventy-five barrels a day.

To this question the same objection was raised and sustained by the Court, and the plaintiff excepted (folo. 29 and 30, Record).

The principal question raised on the motion for a new trial was whether the Court erred in excluding this testimony. It was contended on the part of the defendant that the witness had not shown that he was qualified to express an opinion as to the rental value of the defendant's mill; that it did not appear that the witness had ever been employed in a water power roller mill or had any knowledge of the rental value of such mill or of any roller mill. It did not appear that he had knowledge of the rental value of any kind of a mill. It appeared affirmatively that he had never seen the defendant's mill and had no knowledge of its location, convenience of construction, and arrangement, or of its business; that he had never been to the village of Delavan, where the defendant's mill was situated, and therefore could not know as to the market for the products of the mill, and it was not shown that he knew whether there was any market for the bran shorts and middlings at the mill or in the village of Delavan, or whether the markets for such products was found in the surrounding country villages which would require the product to be hauled at a distance. That the only qualification that the witness showed was that he had owned and operated a roller mill of seventy-five barrels capacity for several years. It was contended that no court had gone so far as to hold that a person not shown to be an expert in values could express an opinion on the value of property which he had never seen.

The rule of law in Wisconsin as to the competency of a witness to testify as to values is the same as the rule applied in the State of New York, which has been approved by this Court.

In Snyder vs. R. R. Co., 25 Wis., 60, the question was, how much less a certain farm was worth by reason of a railroad crossing it.

The Circuit Court permitted farmers living in the vicinity of the farm and who were *well acquainted with the situation and condition of the farm*, to express an opinion as to how much the market value of the farm was diminished in consequence of the railroad crossing it in the way it did.

This ruling was assigned as error. Cole, J., in delivering the opinion, said: "Hence many courts, from the necessity of the case, have sanctioned the rule which permits witnesses to state their opinion as to the value of property which is the subject of litigation. In this case the witnesses were farmers *well acquainted with the situation and condition of the farm*, and they were asked how much the market value of the land not taken was diminished in consequence of the railroad crossing it in the manner it did; how much less per acre is the land worth by reason of the road passing over it? was the question asked. It seems to us that they might give their opinion as to the value of the property if the railroad had not crossed it, and its market value as it then was."

In Clark *vs.* Baird, 9 N. Y., 183, the question was as to how much the cutting off of a strip of land from a tavern stand would diminish its value. "One Nehemiah Smith testified for the plaintiff *that he had examined the tavern stand with a view of buying it.* It was worth a thousand dollars if it extended to the race and trees. The strip taken off would reduce it one-fourth."

This testimony was objected to on the ground that the amount of damages cannot be ascertained by the opinion of witnesses.

The objection was overruled and the defendant excepted.

The Court of Appeals, in sustaining the ruling of the Court below, say: "The objection does not point to any special incompetency in the witness, as for instance that he did not appear to have a sufficient acquaintance with the property to speak understandingly as to its value, but is put upon the broad ground that a witness cannot testify directly upon the money value of the property."

What the ruling would have been in this case had the objection been the same as in the case at bar may be readily inferred from the language above quoted, and the decision of the Court in the subsequent case of Teerpenning *vs.* Insurance Company, 43 N. Y., 278, 282, where the question again was upon the value of property, and the Court say: "On questions of value a witness must often be permitted to testify to an opinion as to value, but the witness must be shown competent to speak upon the subject. He must have dealt in or have some knowledge of the article concerning which he speaks. (Cowen & Hill's Notes 760, note 529.) Persons should be conversant with the particular article and its value in the market, as a farmer or dealer as to the value of lands or cattle, produce, etc. This stands upon the general ground of peculiar skill and judgment about which his opinions are sought. Per Nelson, C. J. Lincoln *vs.* Schenectady and Saratoga R. R. Co., 23 W. R., 433; Bull *vs.* Flagler, 23 Wend., 354; Norman *vs.* Wells, 17 Wend., 136; Lamoure *vs.* Caryl, 4 Denio, 370."

The case was reversed because the witness was not shown to

have sufficient knowledge of the property about which he had been permitted to testify.

The case of Clark *vs.* Baird, *supra.*, was cited with approval in the case of Transportation Line *vs.* Hope, 95 U. S., 297.

In Stone *vs.* Covell, 29 Mich., 259, the question was as to the value of a tract of land. A witness who testified that he was acquainted with the value of land but was not acquainted with the value of land in the region of Pine Grove, where the land in question was situated, except the price put upon lands by the owners in that section, and that he had *examined the land in question*, but lived 27 or 28 miles away, was asked: "Judging that land by these prices that you heard on other lands, what would you say its value was? He answered, I should think the value of that land was not far from $5.00 per acre. The Supreme Court held the testimony competent, the judge writing the opinion saying that his own opinion was against its competency, but yielded to the judgment of his associates.

In Clark *vs.* Rockland Water Power Company, 52 Maine, 68, it was ruled that it was not competent for a witness to give his opinion of the value of a mill after having testified that he had resided many years and owned real estate in the vicinity of the mill, had been assessor of the town, that he was something of a judge of real estate in that vicinity, that he had no special knowledge of the value of mills on that stream, and that he had never bought, sold, owned or operated a mill.

> The Court say: "As a person, having such peculiar knowledge, the witness Williams was produced, and his opinion offered in evidence in the case. Was that opinion, tested by the rules applicable to the class of evidence, admissible? The point to be determined was the value of the plaintiff's mill and privilege in 1850, when it was examined by the witness.
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> In relation to his knowlege upon this point, he says he 'was something of a judge of the value of real estate in that vicinity, but had no special knowledge of the value of mills or mill privileges on that stream; that he never bought, sold, owned or operated a mill.' He thus distinctly negatives the idea that he was possessed of peculiar knowledge or skill in relation to the matter upon which his opinion was desired.
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> It cannot be necessary to cite authorities to show that the opinions of a witness, thus situated, are not admissible in evidence as an expert, which is the only ground on which this witness was excluded."

In Westlake *vs.* St. Lawrence Ins. Co., 14 Barb. (N. Y. Sup. Ct.), 206, it is held that the opinion of a witness in respect to the value of property which he has never seen, is not admissible in evidence.

In this case there was an opinion by Willard, P. J., and Cady, J., both of which concur in holding the testimony inadmissible.

Cady, J., says: "Taggert had never seen the saw mill nor a drawing of it, and although he was a millwright his opinion of its value was not admissible in evidence."

In Tucker vs. R. R. Co., 118 Mass., 546, 548, which was an assessment of land damages sustained by the petitioner by reason of the passage of the respondent's railroad through his farm, it is said:

"The question whether a witness has the requisite knowledge to enable him to give his opinion, is one which is largely within the discretion of the presiding judge or officer.

In this case the witness was a farmer, having a farm near the petitioner's, which was divided by a railroad. He knew the petitioner's farm, his mode and necessities in the management of the farm, and his means of crossing the railroad.

We cannot say that the presiding officer erred in admitting his testimony."

II.

The question whether a witness has the requisite knowledge to enable him to give an opinion, is largely within the discretion of the judge presiding at the trial.

Tucker vs. R. R. Co., 118 Mass., 546.

It certainly cannot be maintained that it was an abuse of discretion to refuse to permit a witness to express an opinion of the rental value of a mill who had never seen said mill and had no knowledge with reference to its business and had never been in the village where the mill was located; especially when it does not appear that the witness had ever been in or seen a water-power mill or ever heard of one having been rented.

III.

The testimony showed that on April 1st, 1884, the attorneys for the defendant served on plaintiff's attorney the following notice:

"If your clients do not within ten days proceed to put the mill in repair so that it will do good work, Mr. Phelps will employ the best millwrights he can obtain and put the mill in order and charge the expense to your clients." (Folio 37 of Record.)

After the time mentioned in this notice had expired the defendant employed competant millwrights who proceeded to put the mill in good condition, and completed the same in August, 1884. (Folio 38 of Record.)

The testimony tended to show that it was necessary, in order to enable the mill to do good work, to put in machinery which cost $1.100 and incur $1,672 additional expense in putting the mill in condition so as to do as good work as other roller mills of 75 barrels capacity. (Folio 30 of Record.)

The plaintiff requested the Court to charge that the plaintiff was

entitled to a fair test of the machinery put into defendant's mill, and that nothing short of that would justify its condemnation.

Such a test requires an ample power to operate the machinery to the best advantage, and this means the whole of the machinery, if the jury find that the machinery was designed and intended to be operated together. It also contemplates competent management by a miller who thoroughly understands such machinery and is able to manipulate and handle it so as to secure the best results of which it is capable (and who is fully disposed to give it a fair trial; in other words, by one in sympathy with the system); which request was embodied by the Court in his general charge to the jury, except the concluding part enclosed in brackets, which it refused to give; to which ruling and refusal the plaintiff excepted.

It requires no argument to show that the defendant was not compelled to find a miller in sympathy with the plaintiff's system to test the mill. If that is the law the defendant might have been limited, in his selection of an expert, to the plaintiff's miller. The defendant was bound to give the mill a fair test by a competent miller who thoroughly understood such machinery and was able to manipulate and handle it so as to secure the best results of which it was capable; and so the Court charged the jury.

It would have been error for the Court to have told the jury that the person making the test should have been partial to the system.

The counsel also excepted to the entire charge in so far as it permitted the defendant to recover $1,100 for machinery put into the mill to enable it to do good work (fols. 45, 46, 47 and 48 of Record).

It is difficult to conceive of any possible objection to the charge in this particular unless counsel takes the position that by enumerating in the contract certain machinery "included" in the proposed mill the defendant was not entitled to have "one first-class 75 barrel capacity roller mill complete" unless the enumerated machinery would make such a mill.

Counsel argued on the motion for a new trial that the plaintiff was to furnish certain specified machinery and that when he had furnished such machinery the contract was performed, whether the mill was a "first-class 75 barrel capacity mill complete" or not.

The Court interpreted the contract differently and held that the plaintiff's contract was not performed unless he had "furnished the defendant with a first-class 75 barrel capacity roller mill complete, capable of doing as good work as other first-class roller mills of similar grade and capacity would do on the same kind of stock (fol. 45 of Record).

In other words, the plaintiff had contracted to furnish a first-class seventy-five barrel capacity roller mill, and the defendant was entitled to have just such a mill, and nothing more or less, and if the plaintiff had failed to furnish it the defendant was entitled to do just what was absolutely necessary to make a first-class seventy-five barrel capacity roller mill complete, and if that could be done

with the machinery furnished by the plaintiff, then the defendant could not be allowed for any additional machinery; but on the contrary, if it was absolutely necessary, in order to make such a mill as the plaintiff agreed to furnish, to put in the additional machinery which the defendant had furnished, or any part of it, then the jury must allow for such of the machinery as was necessary to complete the mill in accordance with the contract.

This interpretation of the contract is so manifestly correct as not to admit of discussion. It is sufficient to say that the defendant was not contracting for the purchase of machinery, but for a first-class 75 barrel capacity roller mill completed and started by the plaintiff. (Folios 16 and 17 of Record.)

IV.

G. M. Bierce, on behalf of the plaintiff, at the commencement of the trial, testified that he was present when the mill was tested in February, 1884, and at that time took and preserved a sample of wheat, flour, middlings and bran for the purpose of showing the work done by the mill from the material used. (Folio 28 of Record.)

In rebutting, the same witness was called to the stand to make a comparative test in the presence of the jury, of the said flour, and flour made by the witness, Hicks, after the mill was re-constructed by the defendant. While this test was going on, Hicks looked at, and handled the samples of flour produced by the witness Beers, and thereupon stated, in the hearing of the jury and of counsel, that the flour had been changed, and that the witness was not using the same flour in this test as that previously shown to the jury. (Folios 42 and 43, of Record.) Whereupon plaintiff's counsel addressed the Court as follows: "Your Honor: Mr. Hicks handles this flour in the presence of the jury and says that our flour is a fraud, and that it was not made a year ago, when Mr. Bierce says, under oath, that it was. Mr. Hicks stands here in the presence of the jury and says it is a fraud."

Court: "The jury will not regard it."

This remark of Hicks' was pressed as ground for a new trial. The Court held that such remark, while improper, was not ground for a new trial. That it could not be presumed that the unsworn statement of Hicks would have any influence with the jury against the sworn testimony of Mr. Bierce, certainly not when the Court had directed the jury to disregard it.

Where the Court has committed error by allowing immaterial evidence to be given, the error may be corrected by directing the jury to disregard it.

Pennsylvania Co. *vs.* Roy, 102 U. S., 451.

An improper statement by a person in the presence of the Court, counsel and jury can be cured as readily as an error committed by

the Court. It differs entirely from a secret statement or an attempt to use improper influence with the jury, where the Court and counsel on the other side have no power to correct the impression made.

This appears to have been a mere expression of opinion by Hicks without considering the impropriety of the statement.

Since the foregoing was in print I have received a copy of the brief of counsel for the plaintiff in error, from which it appears that the learned counsel for the plaintiff takes the position that under the contract the mill was to be satisfactory to the defendant, and that because he neglected to return the mill or offer to return it he thereby obligated himself to pay for it at the contract price and is not at liberty to recoup the cost of completing the mill, in an action for the price.

This position is at variance with the complaint, with the proofs, and with the plaintiff's request of the Court to charge the jury, as will appear from a casual examination of the complaint and the record. The complaint does not set out the contract between the plaintiff and the defendant, but counts on its legal effect. It is alleged that on the 30th day of May, 1883, the plaintiff entered into an agreement with the defendant in writing, wherein and whereby the plaintiff agreed, in consideration of $9,000, to be paid by the defendant, as hereinafter stated, to furnish and put in complete operation for the defendant in his flouring mill at Delavan, in the County of Walworth, in said district, one first-class seventy-five barrel capacity roller mill complete, including, etc., etc. The plaintiff having the right to use machinery, belting, etc., etc., then in said mill, that should be found to be in proper condition for use, except what was in use on the rye and feed side of said mill, the said fixtures and apparatus to be new and first-class in every way and of the latest patent, except as above specified, and to be completed and put in complete running order within 90 days from the date of said agreement. The said sum of $9,000, was to be paid, by the terms of said agreement, for said mill fixtures complete as aforesaid, put in the said mill as aforesaid, in manner following, that is to say: $3,000 on the arrival of said machinery at the said mill of defendant at Delavan; $4,000 *when said mill should be completed and in running order so as to do as good work as other mills of the same kind*, and the balance of $2,000 ninety days after the completion of said mill (folios 5, 6 and 7 of Record).

It will be observed that the plaintiff claimed in his complaint that the second payment was to be made not "when said mill is completed and in running order to the satisfaction of the second party," which is the wording of the contract, but "*when said mill should be completed and in running order so as to do as good work as other mills of the same kind.*"

The answer practically sets up the same contract. It is alleged that the plaintiff represented that the mill, when completed and in running order, would constitute a full, adequate and sufficient plant

and equipment for the manufacture of flour by the roller system, *and would manufacture as good flour as any other roller mills.* (Folio 11, of Record.)

The Record does not contain the testimony offered by the plaintiff to show that his construction of the contract was correct. It is not necessary that it should. The Court having charged in accordance with the plaintiff's contention, and the plaintiff not having excepted to such charge, the Court must presume that the evidence sustained the plaintiff's theory of the contract.

It may not be out of place to call attention to the proof given as long as the Court will presume it to exist.

The contract was signed "Stillwell & Bierce Manufacturing Co. by George C. Tutjers, Agent at Delavan, Wis.," (Folio 17, of Record) and was forwarded to the plaintiff in Ohio. Within a few days the plaintiff wrote the defendant objecting to the second payment being conditional on the mill working to the satisfaction of the defendant. Mr. Phelps immediately replied to the plaintiff's letter stating that when the mill should do as good work as any other roller mill he would be satisfied.

The plaintiff put these letters in evidence and they established the allegation of the complaint, that the second payment was to be made when the mill should be completed and in running order so as to do as good work as other roller mills.

The counsel for the plaintiff requested the Court in effect to charge that the defendant could not condemn or reject the mill without giving it a fair test. (Folio 44 of Record.) He now argues that the defendant could arbitrarily reject the mill and order the plaintiff to remove it. The positions are diametrically opposed to each other.

The ruling of the Court was favorable to the plaintiff's contention and in strict accordance with the construction of the contract claimed by the plaintiff in its complaint.

There was no exception to the charge of the Court on the ground now presented and argued by counsel. (Folio 45 of Record.)

The rule of law for which plaintiff contends has no application to this case. The plaintiff was not selling machinery for a given price. The plaintiff undertook to remove the machinery for grinding with stones in the defendant's mill and use such of the milling machinery as was suitable, and to furnish additional machinery sufficient to re-construct said mill into a roller mill.

The principal part of work consisted of labor in adapting the mill to the roller system. The plaintiff had removed from the defendant's mill the stones used for grinding and taken out all the machinery and delivered the new machinery at the mill as early as June, 1883, and from that time until February, 1884, the plaintiff with its millwrights was prosecuting the work under the contract. The plaintiff had paid, to apply on the contract price for the machinery, work and labor, over $3,700. The rule contended for could not be applied to this state of facts. It would not be just to either party for the defendant to arbitrarily say: I am not satisfied with the working

of this mill, and direct the plaintiff to take out the machinery. In such case, whose duty would it be to restore the old mill to its former condition? Who would suffer the loss arising from the mill remaining idle for eight months while the plaintiff was experimenting and endeavoring to make a mill which should be satisfactory to the defendant?

Again, who would compensate the plaintiff for the work which he had done in putting the mill in order to receive the roller system, and what means would the defendant adopt to recover the $3,700 which he had paid on the contract?

This case differs entirely from the sale of a reaper or a printing press or any other personal chattel which may be tried and returned. The defendant could not have returned the plaintiff's labor performed upon his real estate.

The learned counsel himself has cited the rule applicable to the facts in this case at page 11 of his brief, where he says (quoting from Wood's Mayne on Damages): "One important element in the inquiry will be, could the subject matter of the contract be returned or not? * * * But there are two cases where he cannot return it. The one is where the sale is of a specific chattel upon which the owner has had an opportunity to exercise his own judgment and which is bought with a warranty; *the other where labor is expended upon the defendant's own property, as for instance his materials or his land.*" "In these cases the act of altering would be the subject matter of reduction" Mayne 116.

There was no allegation in the complaint, and no evidence tending to prove what the machinery was worth, disconnected from the labor of constructing the mill. The plaintiff could not have had the judgment that he now claims that he was entitled to have, upon the pleadings or proofs, unless the law entitled the plaintiff to recover the full contract price when the jury have found that he had not furnished and put up in complete running order such a mill as he contracted to furnish.

If the plaintiff in error, is not prepared to maintain this contention, it has no cause to complain of the charge of the Court or of the result of the trial.

JOHN T. FISH,
Attorney for Defendant.

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